NOROL ROJIK JUN v. PP

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
[CRIMINAL APPEAL NO: S-05(SH)-123-03-2016]
31 OCTOBER 2017

CRIMINAL LAW: *Offences – Murder – Accused convicted for offence of murder and sentenced to death – Whether ingredients of charge proved – Whether accused had necessary actus reus and mens rea – Whether trial judge considered evidence in totality – Whether findings made based on suspicion – Whether accused raised reasonable doubts on prosecution case – Whether accused ought to be convicted for lesser offence of culpable homicide not amounting to murder – Penal Code, ss. 300, 302 & 304(a)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused convicted for offence of murder – Accused sentenced to death – Whether ingredients of charge proved – Whether there were failures and misdirection by trial judge in conducting trial – Whether trial judge considered evidence in totality – Whether findings made based on suspicion – Whether counsel assigned by court to represent accused competent – Whether defence raised reasonable doubts on prosecution case – Whether accused ought to be convicted for lesser offence of culpable homicide not amounting to murder – Whether conviction and sentence for murder charge safe – Penal Code, ss. 300, 302 & 304(a)*

The appellant was initially charged at the High Court for murder, an offence punishable under s. 302 of the Penal Code ('the PC') ('the murder charge'). A post mortem report revealed that the victim ('the deceased') sustained chop wounds on his forearm and head, caused by a sharp heavy object such as a parang or a chopper, and these wounds caused severe blood loss and drop of blood pressure, resulting in reduced blood supply to vital organs, leading to death. At the conclusion of the prosecution's case, the High Court Judge found that no *prima facie* case was established against the appellant and acquitted and discharged the appellant of the murder charge. However, he was convicted for the lesser offence of culpable homicide not amounting to murder under s. 304(a) of the PC and sentenced to 18 years imprisonment. Dissatisfied with the said decision, the prosecution appealed to the Court of Appeal. The appeal was allowed and the Court of Appeal ordered the appellant to enter his defence on the murder charge before another High Court Judge ('the trial judge'). Another counsel was assigned by the High Court to represent the appellant. In his unsworn statement from the dock ('unsworn statement'), despite confessing to killing the deceased, the appellant stated that he had no intention to cause his death. At the close of

the trial, the trial judge found the appellant guilty and sentenced him to death. Hence, the present appeal. In support of his appeal, the appellant argued that (i) the defence on the murder charge should not have been called as the most important ingredient, *mens rea*, was absent; (ii) counsel assigned by the High Court to represent the appellant was incompetent as he had no knowledge of the evidence given during the prosecution's case and the defence presented by the previous counsel; (iii) the trial judge failed (a) to explain to the appellant the weight to be given to his unsworn statement; (b) to apply Her Ladyship's mind to the contents of the appellant's cautioned statement ('exh. D1') and to sufficiently consider whether the appellant's unsworn statement and exh. D1 were credible; (c) to direct her mind when Her Ladyship ruled that since the appellant brought with him a parang, it was clearly a meditated murder; this finding was based on suspicion and suspicion is misplaced in a murder trial; (d) to view the entire evidence objectively from all angles, resulting in the appellant losing the chance to be acquitted; and (e) the circumstantial evidence relied upon by the prosecution, which taken together with the other facts and circumstances, do not have the cumulative effect of bringing a reasonable and irresistible inference that the appellant committed the offence of murder.

Held (dismissing appeal; affirming decision of High Court)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The calling of the appellant's defence to the murder charge was on the order of the Court of Appeal, which must be taken as if it was made by the trial judge himself. It was not open to the succeeding judge to re-open the issue of whether a *prima facie* case had been established by the prosecution. The trial judge's duty after the order was made by the Court of Appeal was only to consider whether the appellant's explanation, if any, had cast a reasonable doubt on the prosecution's case. The killing was intentional as it was motivated by a desire to teach the deceased a lesson. The presence of motive negated the appellant's claim of absence of *mens rea*. (paras 11, 12, 15 & 16)

(2) There was nothing to support the appellant's allegation that the counsel who took over was flagrantly incompetent and that due to his incompetence, the appellant had been denied a fair trial, occasioning a miscarriage of justice. Counsel who took over was only dealing with the defence case, which was less onerous than dealing with the case at the prosecution stage. The allegation that the second counsel had no knowledge of the evidence given during the prosecution's case was pure speculation and must be disregarded. (paras 20 & 21)

(3) What weight the court would give to the unsworn statement would depend on the court's assessment of the entire evidence and not based on the unsworn statement alone. It would be wrong for the trial judge

to tell the appellant what weight Her Ladyship would give to his unsworn statement when he had not even uttered a word in his defence. If the trial judge were to tell the appellant that Her Ladyship would give less weight to his unsworn statement, that would be tantamount to pre-judging the defence case. Furthermore, when the appellant was called to enter his defence, the court interpreter had explained to him the three options available to him in making his defence and he chose to give an unsworn statement. The appellant's counsel was also there to advise him on the pros and cons of giving an unsworn statement. Obviously, he had been properly advised by his counsel before making the choice. (paras 26-28)

(4) Most parts of the appellant's unsworn statement were similar to exh. D1. In fact, on all material issues, what the appellant said in his unsworn statement was a repetition of what he said in exh. D1. The ground of judgment showed that the trial judge had indeed taken into consideration the appellant's unsworn statement. Although Her Ladyship did not refer to exh. D1 in her grounds of judgment, the omission had not occasioned any substantial miscarriage of justice and was curable under s. 60(1) of the Courts of Judicature Act 1964. As to the weight to be given to the appellant's unsworn statement, the trial judge had directed herself to the law correctly. (paras 31, 32 & 36)

(5) The trial judge's 'ruling' on the parang could not be said to be a misdirection. In the first place, it was not even a ruling. It was necessary for the trial judge to refer to the parang in her deliberation for the simple reason that it was the murder weapon. It would be wrong for Her Ladyship not to do so. In finding that the killing was intentional, the trial judge was not only guided by the fact that the appellant had brought the parang with him. It was based on all the surrounding facts and circumstances of the case and certainly not based on suspicion. (paras 38 & 39)

(6) The trial judge had considered the evidence carefully. At the conclusion of the trial, what s. 182A of the Criminal Procedure Code requires is for the court to consider all the evidence in determining whether the case had been proved beyond reasonable doubt. This does not mean that the court must decide all over again as to whether a *prima facie* case had been established. (paras 43 & 44)

(7) The trial judge was absolutely right in finding that the murder charge had been proved beyond any reasonable doubt. On the totality of the evidence and the probabilities of the case, the only option open to Her Ladyship was to convict the appellant of the offence of murder as charged and not the offence of culpable homicide not amounting to

A murder under s. 304 of the PC or any other lesser offence. The appellant's act was clearly an act of murder within the meaning of s. 300 para (a) of the PC. (paras 49 & 50)

Bahasa Malaysia *Headnotes*

B Pada asalnya, perayu dituduh di Mahkamah Tinggi kerana membunuh, satu kesalahan yang boleh dikenakan hukuman bawah s. 302 Kanun Keseksaan ('KK') ('pertuduhan membunuh'). Satu laporan bedah siasat mendedahkan mangsa ('si mati') mengalami luka tetakan pada lengan bawah dan kepalanya, yang disebabkan oleh objek berat yang tajam seperti parang atau penebang,
C dan luka-luka ini menyebabkan kehilangan darah yang amat banyak dan tekanan darah menurun, mengakibatkan kekurangan bekalan darah ke organ-organ penting lalu membawa maut. Pada penutup kes pendakwaan, Hakim Mahkamah Tinggi mendapati kes *prima facie* gagal dibuktikan terhadap perayu dan melepaskan dan membebaskan perayu daripada pertuduhan membunuh. Walau bagaimanapun, perayu disabitkan atas kesalahan yang
D lebih ringan iaitu mematikan orang dengan salah yang tidak terjumlah pada kesalahan membunuh orang bawah s. 304(a) KK dan dijatuhkan hukuman penjara 18 tahun. Tidak berpuas hati dengan keputusan tersebut, pihak pendakwaan merayu pada Mahkamah Rayuan. Rayuan ini dibenarkan dan Mahkamah Rayuan memerintahkan perayu membela diri bagi pertuduhan
E membunuh di hadapan Hakim Mahkamah Tinggi yang lain ('hakim bicara'). Mahkamah Tinggi menugaskan peguam lain untuk mewakili perayu. Dalam pernyataan tidak bersumpahnya dari kandang saksi ('pernyataan tidak bersumpah'), walaupun mengakui membunuh si mati, perayu menyatakan dia tidak berniat menyebabkan kematiannya. Pada penutup perbicaraan,
F hakim bicara mendapati perayu bersalah dan menjatuhkan hukuman mati atasnya. Maka timbul rayuan ini. Menyokong rayuannya, perayu menghujahkan (i) pembelaan bagi pertuduhan membunuh tidak sepatutnya diarahkan kerana ketiadaan inti pati paling penting iaitu *mens rea*; (ii) peguam yang ditugaskan oleh Mahkamah Tinggi untuk mewakili perayu tidak cekap
G kerana tidak tahu tentang keterangan yang diberi ketika pendakwaan dan pembelaan yang dibentangkan oleh peguam terdahulu; (iii) hakim bicara gagal (a) menerangkan kepada perayu tentang pemberatan yang diberi pada pernyataan tidak bersumpahnya; (b) mengarahkan minda beliau terhadap kandungan pernyataan beramaran perayu ('eksh. D1') dan mempertimbangkan secukupnya sama ada pernyataan tidak bersumpah perayu dan eksh. D1
H boleh dipercayai; (c) mengarah minda beliau apabila memutuskan bahawa, oleh kerana perayu membawa parang bersama-samanya, ini jelas satu pembunuhan terancang; dapatan ini berasaskan syak dan syak satu salah tanggapan dalam perbicaraan bunuh; (d) melihat kesemua keterangan secara objektif dari semua sudut, menyebabkan perayu hilang peluang dibebaskan;
I dan (e) keterangan ikut keadaan yang menjadi sandaran pihak pendakwaan, yang dipertimbangkan bersama-sama lain-lain fakta dan hal keadaan, tidak mempunyai kesan kumulatif melahirkan inferens munasabah dan tidak boleh dibendung bahawa perayu yang melakukan kesalahan membunuh.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Perintah agar perayu membela diri terhadap pertuduhan membunuh adalah berdasarkan perintah Mahkamah Rayuan, yang mesti dianggap seperti dibuat oleh hakim bicara sendiri. Tidak terbuka buat hakim yang bersidang untuk membuka isu sama ada kes *prima facie* berjaya dibuktikan oleh pihak pendakwaan. Tanggungjawab hakim bicara selepas perintah ini dibuat oleh Mahkamah Rayuan cuma mempertimbangkan sama ada penjelasan perayu, jika ada, membangkitkan keraguan munasabah atas kes pendakwaan. Pembunuhan tersebut dibuat dengan sengaja kerana bermotifkan niat mengajar si mati. Kewujudan motif menidakkan dalihan perayu tentang ketiadaan *mens rea*.

(2) Tiada apa-apa yang menyokong dakwaan perayu bahawa peguam yang mengambil alih terlampau tidak cekap dan, akibat ketidakcekapan ini, perayu dinafikan satu perbicaraan adil, menyebabkan kesilapan mahkamah. Peguam yang mengambil alih cuma menguruskan kes pembelaan, yang kurang membebankan berbanding kes pada peringkat pendakwaan. Hujahan bahawa peguam kedua tiada pengetahuan tentang keterangan yang diberi ketika kes pendakwaan satu spekulasi semata-mata dan mesti dihiraukan.

(3) Apa-apa pemberatan yang diberi oleh mahkamah pada pernyataan tidak bersumpah tersebut bergantung pada penilaian mahkamah terhadap keseluruhan keterangan dan bukan berdasarkan pernyataan tidak bersumpah sahaja. Satu kekhilafan jika hakim bicara memaklumkan perayu apa-apa pemberatan yang beliau akan beri pada pernyataan tidak bersumpahnya sedangkan perayu tersebut belum mengucapkan sepatah perkataan pun dalam pembelaannya. Jika hakim bicara perlu memaklumkan perayu bahawa beliau akan memberi kurang pemberatan pada pernyataan tidak bersumpahnya, ini sama seperti menghakimi kes pembelaan terlebih dahulu. Tambahan lagi, apabila perayu dipanggil membela diri, jurubahasa mahkamah telah menerangkan kepadanya tiga pilihan yang ada untuk membela diri dan perayu memilih memberi pernyataan tidak bersumpah. Peguam perayu juga turut hadir memberi nasihat tentang baik dan buruknya memberi pernyataan tidak bersumpah. Jelas bahawa dia dinasihatkan dengan betul oleh peguamnya sebelum membuat pilihan.

(4) Sebahagian besar pernyataan tidak bersumpah perayu sama dengan eksh. D1. Hakikatnya, bagi kesemua isu material, apa-apa yang perayu nyatakan dalam pernyataan tidak bersumpahnya adalah ulangan apa-apa yang dia nyatakan dalam eksh. D1. Alasan penghakiman menunjukkan

hakim bicara sememangnya telah mempertimbangkan pernyataan tidak bersumpah perayu. Walaupun tidak merujuk eksh. D1 dalam alasan penghakiman beliau, ketinggalan ini tidak menyebabkan kesilapan besar oleh mahkamah dan boleh diremedi bawah s. 60(1) Akta Mahkamah Kehakiman 1964. Tentang pemberatan yang diberi terhadap pernyataan tidak bersumpah perayu, hakim bicara telah mengarahkan minda beliau ke arah undang-undang dengan tepat.

(5) 'Ruling' oleh hakim bicara tentang parang tidak boleh dikatakan sebagai satu salah arah. Malah, ini bukan satu 'ruling'. Hakim bicara perlu merujuk pada parang tersebut dalam pertimbangan beliau, atas sebab mudah, kerana ini senjata pembunuhan. Adalah satu kekhilafan jika beliau tidak berbuat sedemikian. Dalam memutuskan pembunuhan tersebut dibuat dengan sengaja, hakim bicara bukan sahaja berpandukan fakta perayu membawa parang. Ini berdasarkan fakta dan hal keadaan yang menyelubungi kes dan pastinya bukan berdasarkan syak wasangka.

(6) Hakim bicara telah mempertimbangkan keterangan dengan cermat. Pada penutup perbicaraan, yang dikehendaki oleh s. 182A Kanun Tatacara Jenayah adalah agar mahkamah mempertimbangkan kesemua keterangan dalam memutuskan sama ada kes berjaya diputuskan melampaui keraguan munasabah. Ini tidak bermakna mahkamah mesti memutuskan, sekali lagi, sama ada kes *prima facie* berjaya dibuktikan.

(7) Hakim bicara sama sekali betul dalam memutuskan pertuduhan membunuh berjaya dibuktikan melampaui keraguan munasabah. Berdasarkan keseluruhan keterangan dan kemungkinan kes, satu-satunya pilihan yang ada buat beliau adalah mensabitkan perayu atas kesalahan seperti yang dituduh dan bukan kesalahan mematikan orang dengan salah yang tidak terjumlah pada kesalahan membunuh orang bawah s. 304 KK atau mana-mana kesalahan yang lebih ringan. Tindakan perayu jelas satu tindakan membunuh dalam maksud s. 300 perenggan (a) KK.

Case(s) referred to:
Eng Sin v. PP [1974] 1 LNS 33 FC ***(refd)***
PP v. Cho Sing Koo & Anor [2015] 4 CLJ 491 CA ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, ss. 180(1), 182A(1)
Penal Code, ss. 80, 96, 300(c), 302, 304(a)

For the appellant - Abdul Gani Zelika; M/s Johari & Amin
For the respondent - Ahmad Sazilee Abdul Khairi; DPP

[Editor's note: For the High Court judgment, please see PP v. Norol Rojik Jun [2016] 1 LNS 545 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The appellant was initially charged in the High Court at Tawau, Sabah, with the murder of one Persie Santos Cayanong, an offence punishable with death under s. 302 of the Penal Code. At the end of the prosecution case, the learned trial judge found that no *prima facie* case had been established against him. He was accordingly acquitted and discharged of the murder charge but was called upon to enter his defence on the lesser offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code.

[2] The reason why the learned judge acquitted the appellant of the murder charge was because he found that although the appellant intended to cause the fatal injuries, they were not sufficient in the ordinary course of nature to cause death, an obvious reference to s. 300(c) of the Penal Code.

[3] Medical evidence showed that the deceased sustained 23 injuries, 12 of which were caused by a sharp heavy object such as a parang or chopper. The forensic pathologist Dr Jessie Hiu (PW8) concluded in her post mortem report (exh. P41) that the cause of death was hypovolemic shock due to or as a consequence of a chop wound on the deceased's right forearm and chop wounds on his head.

[4] The photos at pp. 416-418 of the record of appeal show the severity of the injuries on the deceased's right forearm, his right leg, neck and head. PW8's expert evidence was that the injuries sustained by the deceased caused severe blood loss and drop of blood pressure, resulting in reduced blood supply to vital organs leading to death.

[5] When called upon to enter his defence on the s. 304(a) offence, the appellant chose to remain silent, whereupon the learned judge proceeded to convict him and sentenced him to 18 years imprisonment with effect from the date of his arrest.

[6] Dissatisfied with the decision to acquit the appellant of the murder charge, the prosecution appealed to this court. The appeal was allowed and the appellant was ordered to enter his defence on the original murder charge. The conduct of the trial was then taken over by another High Court Judge as the learned judge who initially heard the case had retired. The appellant was also assigned with a new counsel to defend him.

[7] This time around the appellant chose to give unsworn statement from the dock when he entered his defence. At the conclusion of the trial and having heard arguments by both sides, the learned judge found the appellant guilty as charged and sentenced him to death, hence the present appeal before us.

[8] In his unsworn statement from the dock, the appellant explained why and how he killed the deceased. We reproduce below the material parts of his statement:

> Kami sampai jam lebih kurang 6.50 pagi dan kami pun naik ke rumah saya dan masuk ke bilik saya dan bersarapan disitu. Selepas bersarapan kami berbual sekejap dan kemudian si Mosidi turun ke bawah dan saya pun ceritakan pada Binga mengenai si Persie yang telah memaki hamun isteri saya dan menyebabkan kami sekeluarga sekarang sudah tiada tempat tinggal sendiri. Saya tanya si Binga "macam mana saya masuk dalam bilik saya potong itu orang" yang bermaksud "macam mana kalau saya masuk ke bilik si Persie dan cederakan dia?" dan si Binga cakap dia ikut saja di belakang saya untuk jaga keselamatan saya. Seterusnya saya buka beg galas saya dan ambil parang kerja saya.
>
> 9. Seterusnya saya berjalan ke bilik Persie iaitu bilik nombor 3 dan saya terus tendang pintunya sampai terbuka dan saya masuk dan tetak si Persie di lehernya satu kali di depan isterinya Normah yang juga ada disitu. Selepas menetak saya pun berundur sebab saya cuma mau cederakan dia saja supaya dia jera tetapi si Persie tiba-tiba bangun dan meluru ke arah saya mahu memukul. Bila melihat dia meluru saya pun rasa takut yang amat sangat dan kemudian saya dapati diri saya macam hilang kawalan ke atas badan saya sendiri dan perasaan saya macam melihat dalam mimpi saja. Saya tidak dapat kawal diri saya walaupun saya sedar saya sedang melibas parang beberapa kali ke kepalanya. Saya juga hilang kesedaran sehingga saya tidak boleh ingat samada Persie ada menangkis dengan tangannya atau jika kepalanya terkena tetakan parang saya sebab tangan saya hanya melibas sebarangan saja tanpa saya niatkan untuk buat apa-apa. Saya nampak tangannya ada cedera tapi sekejap saja sebab selepas itu isterinya si Normah pun meluru ke arah saya dan saya tidak dapat kawal diri saya dan menyerang Normah dengan parang. Normah kena tetakan saya di bahagian kening dan saya juga tetak kepalanya beberapa kali tapi saya tidak pasti berapa kali dan di bahagian mana kena.

[9] The unsworn statement was clearly a confession by the appellant that he killed the deceased but avoiding liability by saying that he had no intention to cause death. This is what he said in para. 12 of the statement:

> 12. Saya disini ingin menjelaskan bahawa saya sebenarnya tidak ada niat mahu bunuh si Persie. Saya memang mau tetak dia satu kali saja untuk cederakan dia tapi tidak untuk matikan dia. Kalau saya memang mahu bunuh dia maka saya tidaklah akan pergi menyerah diri selepas itu pula. Saya sebenarnya sangka kalau dapat cederakan dia maka dia akan takut dan keluar dari rumah sewa keluarga isteri saya. Saya sehingga sekarang tidak dapat jelaskan kenapa selepas Persie menerkam, saya tiba-tiba hilang kawalan ke atas diri saya sendiri.

[10] The appellant's first ground of appeal against conviction was as follows:

The learned High Court Judge should not have called the defence on the charge of murder as it was obvious that the most important ingredient of murder, ie, *mens rea* was absent. There was absolutely no evidence at all that the Appellant intended to murder anyone particularly the deceased.

[11] We found no merit in this ground of appeal. First of all, the calling of the appellant's defence to the original murder charge was on the order of this court, which must be taken as if it was made by the trial judge himself. It was therefore not open to the succeeding judge to reopen the issue of whether a *prima facie* case had been established by the prosecution. Nor was it open to us, being a court of co-ordinate jurisdiction, to do so.

[12] The trial judge's duty after the order was made by this court was only to consider whether the appellant's explanation, if any, had cast a reasonable doubt in the prosecution case. But of course in doing so, the learned judge was bound by s. 182A(1) of the Criminal Procedure Code ("the CPC") to consider all the evidence adduced before the court, which necessarily includes evidence adduced by the prosecution at its stage of the case.

[13] It was also contended under the first ground of appeal that the learned judge erred in failing to address her mind to the appellant's defence of automatism, 'uncontrolled action' or temporary insanity which learned counsel described as 'amuk'. There is no merit in the contention.

[14] The maxim that a man intends the natural and probable consequences of his act is not to be avoided when dealing with the question of intention in murder trials: *Eng Sin v. Public Prosecutor* [1974] 1 LNS 33; [1974] 2 MLJ 168 FC. To establish any of these defences, expert medical evidence was required because whether or not the appellant was driven by automatism or temporary insanity when he killed the deceased is in the realm of medical science. The burden was on the appellant to prove these defences on the balance of probabilities, ie, the civil standard of proof.

[15] No such proof was forthcoming from the appellant. As such, there was nothing before the court for the learned judge to come to a finding that the appellant was temporarily insane at the time he committed the offence. In any event, the only reasonable inference to be drawn from the proved facts was that the killing was intentional as it was motivated by a desire to teach the deceased a lesson.

[16] The presence of motive negates the appellant's claim of absence of *mens rea*, and the learned judge had given her reasons why she found the killing to be intentional. She was perfectly entitled to come to that finding unless it could be shown that she got the facts or the law or both facts and law wrong, which was not the case here.

[17] As for the second ground of appeal, the appellant's complaint was that:

> The counsel who was assigned by the High Court to represent the Accused in his defence was an incompetence *(sic)* counsel in conducting the defence of the Appellant since he has no knowledge of what was the evidence given during the prosecution case and the line of defence of the Appellant presented by the previous assigned counsel and the Appellant was not fully advised and made understood of the weight of evidence in making unsworn statement.

[18] There are two parts to this ground of appeal. The first is a complaint that the assigned counsel who took over from the appellant's previous assigned counsel was incompetent. The second is that the learned judge failed to explain to the appellant the weight to be given to his unsworn statement from the dock.

[19] First, the complaint against the second assigned counsel. The law on incompetence of counsel in a criminal trial has been explained by the apex court in *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 where Gopal Sri Ram FCJ delivering the judgment of the court said:

> In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments.

[20] Going by the record of appeal, we must say that the appellant's complaint is baseless. There is nothing to support his allegation that counsel who took over from the first was flagrantly incompetent and that due to his incompetence, the appellant had been denied a fair trial, thereby occasioning a miscarriage of justice.

[21] It must be remembered that at that stage of the trial, counsel who took over from the first was only dealing with the defence case, which arguably is less onerous than dealing with the prosecution stage of the case. The appellant's allegation that the second counsel had no knowledge of the evidence given during the prosecution case is pure speculation and must be disregarded.

[22] The allegation of incompetence directed at the second assigned counsel is unfair and should not have been made as the lawyer was not given the opportunity to defend himself against such serious allegation as dereliction of duty by an attorney in defending a person charged with a capital offence.

[23] The fact is, the appellant knew exactly what the case against him was, as he was present and represented by the first assigned counsel throughout the case for the prosecution. There was nothing complicated in the evidence of the prosecution witnesses, particularly the evidence of the deceased's wife who witnessed the attack and who herself was slashed by the appellant with the same parang that he used to slash the deceased.

[24] Given the nature of the evidence, it is far-fetched to say that the appellant did not fully understand what the case against him was. More importantly, he did not dispute that the injuries were caused by him. His dispute was over the question of intention to cause death.

[25] With regard to the second part of the second ground of appeal, the contention by learned counsel in his written submissions was that since the appellant had chosen to give unsworn statement from the dock, the learned judge was under a duty, before the appellant proceeded to enter his defence, to explain to him the weight that the court would give to such unsworn statement from the dock.

[26] We found nothing of substance to the argument. What weight the court would give to the unsworn statement would depend on the court's assessment of the entire evidence before the court and not based on the unsworn statement alone. It would be wrong for the learned judge to tell the appellant what weight she would give to his unsworn statement when he had not even uttered a word in his defence.

[27] Since the appellant had not even started with his defence, the learned judge would not know what he was going to say in his unsworn statement, or whether he was going to give written or oral unsworn statement. If the learned judge were to tell the appellant that she would give less weight to his unsworn statement, that would be tantamount to prejudging the defence case. In any event, the appellant's counsel was there to advise him on the pros and cons of giving an unsworn statement from the dock.

[28] Further, there is no dispute that when the appellant was called upon to enter his defence, the court interpreter had explained to him the three options open to him in making his defence, and he chose to give an unsworn statement from the dock. Obviously, he had been properly advised by his counsel before making the choice. This was confirmed by the appellant himself in his unsworn statement when he said:

> 1. Saya memilih untuk memberi keterangan bertulis dari kandang tertuduh. Saya memilih cara ini selepas mendengar penjelasan oleh peguam saya pada hari jumaat 23 Oktober 2015 di Penjara Tawau semasa dia datang melawat.

[29] The third ground of appeal was this:

> The learned High Court Judge had failed to consider the evidence before her in totality before convicting the appellant had the learned High Court Judge applied her mind to the content of exhibit D1, had she applied her mind to the full content of exhibit D1 she would have found that the Appellant's statement contained therein shall cast a reasonable doubt to the prosecution case and such failure had resulted the deprivation of the Appellant from being acquitted of the offence charged.

[30] The first thing to note with regard to this ground is that the appellant himself confirmed that the contents of his cautioned statement (exh. D1) were in most parts similar to the contents of his unsworn statement from the dock. This is what he said in para. 2 of his unsworn statement:

> 2. Saya dengan ini menyatakan bahawa kebanyakan keterangan ini adalah sama dengan kandungan Pemeriksaan dalam Percakapan saya dibawah seksyen 112 KPJ yang mana saya berikan pada C/Insp Ladamah Bin Haji Sulaiman pada 17/11/2011. Oleh itu saya mohon agar keterangan dalam percakapan tersebut ditandakan sebagai eksibit D1.

[31] We have compared the appellant's cautioned statement with his unsworn statement from the dock and it is true that most parts of his unsworn statement are similar to his cautioned statement. In fact, on all material issues, what he said in his unsworn statement was a repetition of what he said in his cautioned statement. We had perused the learned judge's grounds of judgment and found that Her Ladyship had indeed taken into consideration the appellant's unsworn statement when at para. 4, p. 5 of the record of appeal, she stated as follows:

> … this court is of the view, the unsworn statement given by the accused from the dock is considered as an evidence and this goes on further for this court to evaluate the accused's evidence and what weight is to be given.

[32] Thus, although the learned judge did not refer to the appellant's cautioned statement in her grounds of judgment, the omission had not occasioned any substantial miscarriage of justice and is curable by the proviso to s. 60(1) of the Courts of Judicature Act 1964. For context, we reproduce below the whole of s. 60(1):

> 60(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the manner as it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[33] It is clear from her grounds of judgment that the learned trial judge had considered the appellant's defence with meticulous care and having done that, found that his explanation did not cast any reasonable doubt in her mind as to the guilt of the appellant. On the crucial issue of intention to cause death, the learned judge referred to *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 FC and then correctly applied the *ratio decidendi* of the case to the proved facts when she said:

6. The facts remained established in the prosecution stage that there were 23 injuries all over the accused's body and this was consistent with injuries caused by a "parang". The deceased's cause of death was due by chop wounds on the right forearm which cut the ulnar artery and this was never denied by the accused that he had caused these injuries.

7. 23 injuries on the body were more than just a lesson to the deceased and those injuries the deceased sustained to the head and neck, can be fatal. This court had to agree with the prosecution that the seriousness of the injury and the type of weapon used by the accused intended to kill the victim. The accused came armed, he repeatedly slashed the deceased despite the plea to stop and this leads to a conclusion that he had intended to kill the accused bearing in mind that lack of force as what contended by the defence counsel does not necessarily lack the intention to kill.

[34] The learned judge had in the earlier part of her grounds of judgment (see p. 13) observed:

10. This intention of the accused was explicit because the accused barged into the room armed with "parang" and attacked the deceased who was then in bed, slashing him on the head and neck. When the deceased attempted to fend off the attack he was slashed on the feet and legs; and despite the intervention and plea by PW3 to the accused to stop the attack on her husband (the deceased), the accused did not stop but continued to chase after the deceased who attempted to flee the room slashing him multiple times on the back of the chest, forearm and buttocks. PW3 who attempted to stop the accused was herself slashed and sustained several injuries.

11. Furthermore, "parang" is a deadly weapon, once used it will either cause serious injuries or death. Therefore the use of such weapon is deemed as an indicator of intention possessed by the accused. The nature and number of injuries the deceased sustained and weapon used to inflict these injuries leave no doubt as to the intent of the accused to inflict serious body injuries to the deceased.

[35] The fourth ground of appeal was as follows:

> The learned High Court Judge had failed to sufficiently consider whether the Appellant's unsworn statement and his cautioned statement in exhibit D1 is credible or otherwise and nowhere in her grounds of judgment that she addressed the issue and this failure is a misdirection and the Appellant therefore is entitled to be acquitted of the offence charged.

[36] This ground is likewise without any merit. Page 70 of the record of appeal shows that the learned judge had recounted the details of what the appellant said in his unsworn statement, which as we said, was a repetition of what he said in his cautioned statement. As to the weight to be given to the appellant's unsworn statement from the dock, the learned judge had directed herself to the law correctly when she said:

> 3. The evidence of the accused from the dock at first instance has to be given consideration as part of his evidence before the court. However, the issue on what weight to be attached to such statement arise. The court should give less weight to the accused's evidence because the prosecution has no means to verify its veracity. The law has been settled in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145, the Federal Court has said as follows:
>
> > [202] We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge (*Lee Boon Gan v. Regina* [1954] 1 LNS 39; [1954] 1 MLJ 103; *Udayar Alagan & Ors v. PP* [1961] 1 LNS 146; [1962] 1 MLJ 39; *Mohamed Salleh v. PP* [1968] 1 LNS 80; [1969] 1 MLJ 104; *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537).

[37] As for the fifth ground of appeal, the complaint was that:

> The learned High Court Judge has misdirected herself when she ruled that since the Appellant had brought with him 'parang' which according to her not related to the Appellant's job as a welder, it was a clear meditated murder, whereas, the said finding was based on suspicion and suspicion or conjecture is misplaced in murder trial and as such the learned High Court Judge erred in her finding.

[38] The issue raised was inextricably linked to the question of intention to cause death. With due respect to learned counsel, we fail to see how the learned judge's 'ruling' on the parang can be said to be a misdirection. In the first place, it was not even a ruling. It was necessary for the learned judge to refer to the parang in her deliberation for the simple reason that it was the murder weapon. It would be wrong for her not to do so.

[39] In finding that the killing was intentional, it is clear that the learned judge was not only guided by the fact that the appellant had brought the parang with him. It was based on all the surrounding facts and circumstances of the case and certainly not based on suspicion or conjecture as alleged by the appellant.

[40] Of course learned counsel was right in saying that the mere fact that the appellant brought a parang with him is not evidence of intention to kill. But as every lawyer with some basic knowledge of the law knows, the golden rule on evaluation of evidence is that except where there is direct evidence of admission, the evidence must be considered in its entirety and not in bits and pieces.

[41] In this case, there was no dispute that the appellant's intention from the start was to attack the deceased while arming himself with a parang, and the parang was indeed used to slash the deceased to death. Thus, his act of bringing the parang before the attack is not neutral evidence as counsel seems to be suggesting. It was intended to be used as the weapon of offence by the appellant.

[42] The sixth ground of appeal was:

> The learned High Court Judge did not view the whole of the evidence objectively from all angles with the result that the Appellant had lost the chance which was fairly open to him for being acquitted.

[43] There is no truth to this complaint. The learned judge had considered the evidence carefully, as can be seen from her grounds of judgment which run into 24 pages. In fact, the learned judge had gone beyond what was required of her when she embarked on a re-evaluation of the prosecution's evidence to determine whether a *prima facie* case had been established under the heading 'EVALUATION AND FINDINGS AT THE END OF THE PROSECUTION'S CASE' (see pp. 63-70 of the record of appeal). So, if at all the learned judge had erred, she had in fact erred in favour of the appellant.

[44] At the conclusion of the trial, what s. 182A(1) of the CPC requires is for the court to consider all the evidence in determining whether the case had been proved beyond reasonable doubt. This does not mean however that the court must decide all over again whether a *prima facie* case had been established by the prosecution. That is a requirement of s. 180(1) of the CPC at the close of the prosecution case and not a requirement of s. 182A(1) at the close of the defence case.

[45] It bears repeating that the learned judge's duty at the conclusion of the trial was only to determine whether the appellant's explanation had cast a reasonable doubt in her mind as to his guilt and whether the case had been proved beyond any reasonable doubt by the prosecution, and not to determine whether a *prima facie* case had been established.

[46] As for grounds of appeal nos. 7, 8 and 9, we shall deal with them together as they are inter-related. The grounds are as follows:

> **Ground 7:**
>
> The learned High Court Judge failed to appreciate that the circumstantial evidence relied upon by the prosecution which taken together with the other facts and circumstances do not cumulative effect of bringing a reasonable and irresistible inference that the Appellant had committed the offence of murder.
>
> **Ground 8:**
>
> The learned High Court Judge ought to have given the benefit of the doubt to the Appellant.
>
> **Ground 9:**
>
> The learned High Court Judge failed to appreciate the evidence of the Appellant as a whole to the conclusion as to the Appellant defence and that the Appellant is entitled to have been convicted under lesser offence of section 304 of Penal Code.

[47] Taking these grounds cumulatively, our comment is that once the learned judge had made a finding of fact that the appellant intended to cause the deceased's death, the question that the appellant was entitled to be convicted of the lesser offence of culpable homicide not amounting to murder under s. 304 of the Penal Code does not arise at all.

[48] Was there any reason for the learned judge to give the appellant the benefit of the doubt, as suggested by learned counsel? But first, what is meant by "reasonable doubt"? This court in *PP v. Cho Sing Koo & Anor* [2015] 4 CLJ 491 had occasion to deal with this point at paras. [34] and [35] as follows:

> [34] We wish to reiterate that the burden on the prosecution is to prove its case beyond reasonable doubt, not beyond the shadow or flicker of a doubt. That is the degree of proof required and there is no dearth of authority on what constitutes "reasonable doubt". Unless this is properly understood there is the danger that in giving maximum evaluation to the evidence of the prosecution at the close of its case or in considering the evidence of the accused at the close of the defence case, a burden that is heavier and more onerous than what the law requires is demanded of the prosecution. Justice is not better served by acquitting a guilty man than it is to convict an innocent one.
>
> [35] Perhaps we should reproduce the oft-quoted pronouncement of Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372 to better understand the correct burden on the prosecution:

> That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[49] On the proved facts of the present case, we were of the view that the learned judge was absolutely right in finding that the murder charge had been proved beyond any reasonable doubt. On the totality of evidence and the probabilities of the case, the only option open to the learned judge was to convict the appellant of the offence of murder as charged and not the offence of culpable homicide not amounting to murder under s. 304 of the Penal Code or any other lesser offence.

[50] The appellant's act was clearly an act of murder within the meaning of s. 300 para. (a) of the Penal Code. The provision reads:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder
>
> (a) If the act by which the death is caused is done with the intention of causing death.

[51] None of the general exceptions under Chapter IV of the Penal Code applied in the appellant's favour as his defence of lack of intention to cause death did not fit in with any of the defences under Chapter IV, such as the defence of accident under s. 80, private defence under s. 96 or grave and sudden provocation under Exception 1 to s. 300 of the Penal Code.

[52] As for the defence of temporary insanity raised by the appellant in his first ground of appeal, we have mentioned that without expert medical evidence, the defence was not sustainable.

[53] The appellant's defence, as we said, was a confession and avoidance, ie, confessing to the killing but avoiding liability by saying that he did not intend to cause death. This line of defence falls outside the scope of the general exceptions under Chapter IV of the Penal Code. In any event, the learned trial judge had found that the appellant intended to cause the deceased's death. We had no reason to disturb this finding of fact.

[54] It was for all the foregoing reasons that we dismissed the appellant's appeal and affirmed the decision of the High Court.